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In The
Supreme Court of the United States
October Term, 1988

THE STATE OF COLORADO,
Petitioner,
v.
ANTONIO HARRIS,
Respondent.

ON WRIT OF CERTIORARI TO THE
COLORADO SUPREME COURT

BRIEF OF AMICI CURIAE FOR THE STATES OF DELAWARE, FLORIDA, IDAHO, KANSAS, MAINE, MARYLAND, MICHIGAN, NORTH CAROLINA, SOUTH CAROLINA, VERMONT, WEST VIRGINIA, WYOMING

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FOURTH AMENDMENT BARS POLICE FROM TALKING TO A SUSPECT WHO IS IN CUSTODY PURSUANT TO A JUDICIAL ORDER AUTHORIZING THE ACQUISITION OF NONTESTIMONIAL IDENTIFICATION EVIDENCE, UNLESS THE SUSPECT INITIATES THE CONVERSATION?

OPINION BELOW

The opinion of the Colorado Supreme Court in *State v. Harris*, (slip opinion no. 86 SC 285, decided July 5, 1988) has not yet been reported, but appears in Appendix C of Petitioner's brief.

INTEREST OF THE AMICI CURIAE

Some states filing Amicus Curiae have similar statutes to Colorado Rules of Criminal Procedure, Rule 41.1 which allows detention based on less than probable cause for nontestimonial purposes of identification procedures. Others are proposing similar statutes in future legislative sessions. Some do not have nor plan to have similar statutes. All states, however, are concerned with the implications of the Colorado Supreme Court decision in the broader range of circumstances which involve any legal Fourth Amendment detention in conjunction with voluntary Fifth Amendment statements given pursuant to Miranda warnings. The Amici are concerned that the Colorado Supreme Court decision rests on a serious misapprehension of federal constitutional law which could have severe implications in other jurisdictions.

The Colorado Supreme Court has determined that *any questioning* of a suspect who was in custody pursuant to a judicial order authorizing the acquisition of nontestimonial identification evidence is forbidden and that these statements must be excluded pursuant to the Fourth Amendment suppression rules. The Amici believe that this ruling impermissibly penalizes the states and their law enforcement officers in situations where the police officer is legally entitled to be in the presence of a citizen. The determination that the illegal act or misconduct requiring suppression is the actual questioning seems to be in direct contravention of United States Supreme Court decisions. The criteria used by the United States Supreme Court in determining the viability of statements after an illegal detention or seizure are different from the cases in which statements were allowed because the initial detention was consensual and voluntary. Colorado has ignored this distinction.

This case would be an important vehicle for clarifying the relationship between the Fourth and Fifth Amendments in such a situation. The question has not been decided by the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions which were involved in this case are listed in the Petitioner's brief, page 1 through 3.

REASONS FOR GRANTING THE WRIT

ARGUMENT

Introduction

Colorado has argued that the holding of its Supreme Court, which approved Respondent's detention on less than probable cause to obtain nontestimonial or identification evidence but ruled that this detention could not be used by the police to question him without violating his federal and state constitutional guarantees against illegal searches and seizures. is erroneous. Amici agree with Colorado's reasoning and adopt those positions as a basis for this brief. The states believe, however, that an expansion of the arguments concerning the applicability of the exclusionary rule to voluntary Fifth Amendment statements in order to effectuate Fourth Amendment rights against unreasonable search and seizure would be helpful in deciding this issue. Reasons for granting Writ of Certiorari are as follows:

I. THE QUESTIONING OF RESPONDENT WAS NOT PROCEEDED BY AN IMPERMISSIBLE SEIZURE OF HIS PERSON AND, THEREFORE, IT CANNOT BE CONTENDED THAT HIS VOLUNTARY CONSENT TO QUESTIONING WAS INFECTED BY AN UNLAWFUL DETENTION.

It is important to note that the Colorado court decided that voluntary statements must be suppressed even though police questioning occurred incidental to a court authorized order which was upheld. The court based this conclusion in reliance on *Davis v. Mississippi*, 394 U.S. 713, 22 L.Ed.2d 674, 89 S.Ct. 1470 (1969); *Brown v. Illinois*, 422 U.S. 590, 45 L.Ed.2d 416, 95 S.Ct. 2254 (1975); and *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

A close analysis of these three cases would be helpful. *Davis v. Mississippi, supra*, involved the detention without warrants of at least twenty-four youths who were taken to police headquarters, questioned, fingerprinted, and then released without charge. Forty or fifty other youths were interrogated either at police headquarters, school or on the streets. In that case there was no claim that Petitioner voluntarily accompanied the police to headquarters or willingly submitted to fingerprinting. This Court ordered suppression of the evidence based on the Fourth Amendment rights against unreasonable search and seizure. The Court stated, however, that they were not deciding whether the requirements of the Fourth Amendment could be met by narrowly circumscribed procedures for obtaining fingerprints during the course of a criminal investigation of those for whom there was no probable cause to arrest. The Court did not reach that decision because there had been no attempt to employ these procedures, the detention was not authorized by a judicial officer and petitioner was subject to interrogation. It was not

determined which of these three factors would be more significant.

In *Brown v. Illinois, supra*, the question was raised whether Miranda warnings were sufficient to purge the primary taint of the unlawful invasion. Brown identified several factors to be considered: the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and particularly the purpose and flagrancy of the official misconduct.

In *Dunaway v. New York, supra*, the Court again stated that Fourth and Fourteenth Amendments were violated when, without probable cause or court order, petitioner was seized and transported to the police station for interrogation.

In all three cases, a determination of the question whether the searches were a product of an earlier official violation of the Fourth Amendment was essential to a correct disposition of the other issues regarding suppression. Only after it was determined that the Fourth Amendment had been violated did the Court use a balancing test to determine whether the voluntary statements should be admitted.

In the present case, the Colorado Court determined that the initial detention was lawful and constitutional. The court determined that even though the detention met constitutional safeguards, the mere fact that questioning occurred expanded that detention illegally. The Colorado court had earlier upheld the constitutionality of this procedure. *People v. Madson*, 638 P.2d 18 (Colo. 1981). By ignoring the relevancy of the lawful detention, the Colorado court has created serious ramifications for other jurisdictions in which a police officer is legally in the presence of a citizen. See, *In Re Fingerprinting of M.B.*, 309

A.2d 3 (N.J. Sup. Ct., 1973) in which interrogation was allowed pursuant to a similar rule. The Writ of Certiorari should, therefore, be granted in order to clarify the law regarding legal detentions and police questioning.

II. THE COLORADO SUPREME COURT DECISION RESTS ON A SERIOUS MISAPPREHENSION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS SERIOUS IMPLICATIONS FOR ALL JURISDICTIONS.

In *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968), the Court acknowledged that the Constitution does not prevent police officers from having street encounters with citizens. Furthermore, in *United States v. Mendenhall*, 446 U.S. 544, 64 L.Ed.2d 497, 100 S.Ct. 1870 (1980), the Court determined that evidence need not be suppressed because Respondent was not illegally detained when she consented to be searched. The Court reasoned that since the initial detention was not illegal and Respondent's Fourth Amendment rights were not violated, the Respondent's voluntary consent to search was not infected by an unlawful detention.

INS v. Delgado, 466 U.S. 210, 80 L.Ed.2d 247, 104 S.Ct. 1758 (1984) is a case not considered by the Colorado court which should have been considered. That case involved the questioning of employees without reasonable suspicion that each questioned individual was an illegal alien. The Court stated that it is apparent that police questioning by itself is unlikely to result in a Fourth Amendment violation. The Court also stated that it made no difference in this case that the encounters between INS and the Respondents took place inside a factory which is not usually accessable to the public.

> The INS officers were lawfully present pursuant to consent or a warrant, and other people were in the area during the INS agents' questioning. Thus, the same considerations attending contacts between the police and citizens in public places should apply to the questions presented to the individual respondents here.

466 U.S. at 218 (Footnote 5).

To that extent it should not matter in the present case that the questioning occurred en route to the hospital or at the hospital, etc. The police officer was in a place where he had legal authority to be; his subsequent questioning of Respondent should not, therefore, implicate Fourth Amendment suppression rules. Since the Colorado decision rests on a serious misapprehension of federal constitutional law regarding the relationship of the Fourth Amendment in conjunction with the Fifth Amendment, the Writ of Certiorari should be granted in order to apply the correct standard.

CONCLUSION

The decision in *State v. Harris*, *supra*, has alarming ramifications for all states in those circumstances where a law enforcement officer has a legal right to be in the presence of a citizen but the mere act of questioning transforms that legal presence into an illegal Fourth Amendment violation. The holding of the Colorado Court seems to be in direct contravention of United States Supreme Court cases. One area of cases involves an illegal detention and then requires balancing various factors to consider the admissability of the subsequently obtained evidence. The other area involves a legal detention and, therefore, only requires the suppression of evidence if the statements are not voluntary or the searches not consen-

sual. The question regarding a legal detention on less than probable cause with the admissibility of subsequent statements has not been decided by this Court and should be. A Writ of Certiorari should be granted to resolve this problem.

Respectfully submitted,

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